Supreme Court, U.S.
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No. 95-1495

In The

Supreme Court of the United States

October Term, 1995

ARNOLD D. BERKELEY,

Petitioner,

vs.

HOME INSURANCE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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15 pp

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Whether the Court should grant a petition for writ of certiorari to review a decision of the United States Court of Appeals for the District of Columbia Circuit when:

a. The court of appeals affirmed, on a different ground, the district court's ruling on a question of law concerning the construction of an exclusion in an insurance contract?

b. The court of appeals reviewed the district court's award of damages under the "clearly erroneous" standard and not the "*de novo*" standard?

LIST OF PARTIES

Respondent, The Home Insurance Company, is a wholly owned subsidiary of Home Holdings, Inc.

TABLE OF CONTENTS

	Page
Counterstatement of the Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iii
Statement of the Case	1
Reasons for Denying the Writ	4
I. It was acceptable for the court of appeals to affirm the district court's dismissal of Berkeley's indemnification claim on a different ground.	4
II. The court of appeals applied the appropriate standard in reviewing the district court's award of damages.	7
Conclusion	9

TABLE OF CITATIONS

Cases Cited:

Adkins v. Asbestos Corp., Ltd., 18 F.3d 1349 (6th Cir. 1994)	8
American Red Cross v. Travelers Indem. Co., 816 F. Supp. 755 (D.D.C. 1993)	5, 6

Contents

	Page
Fountain v. Filson, 336 U.S. 681 (1949)	6, 7
Four Corners Service Station, Inc. v. Mobil Oil Corp., 51 F.3d 306 (1st Cir. 1995)	8
Hall v. Gus Const. Co., Inc., 842 F.2d 1010 (8th Cir. 1988)	8
Helvering v. Gowran, 302 U.S. 238 (1937)	4
Herbert v. Nat'l Academy of Sciences, 974 F.2d 192 (D.C. Cir. 1992)	6
Hull by Hull v. United States, 971 F.2d 1499 (10th Cir. 1992), *cert. denied*, 507 U.S. 1030 (1993)	8
Marine Trans. Line v. M/V Tako Invader, 37 F.3d 1138 (5th Cir. 1994)	8
Nakajima v. United States, 965 F.2d 987 (11th Cir. 1992)	9
Safer v. Perper, 569 F.2d 87 (D.C. Cir. 1977)	8
Sands v. Runyon, 28 F.3d 1323 (2nd Cir. 1994)	8
Securities and Exchange Comm'n v. Chenery Corp., 318 U.S. 80 (1943)	4, 5
Stanley Gudyka Sales v. Lacy Forest Products, 915 F.2d 273 (7th Cir. 1990)	8

Contents

Page

Sutton v. Earles, 26 F.3d 903 (9th Cir. 1994) 8

Tyminski v. United States, 481 F.2d 257 (3rd Cir. 1973) . 8

U.S. Fire Ins. Co. v. Allied Towing Corp., 966 F.2d 820 (4th Cir. 1992) 8

STATEMENT OF THE CASE

This is an insurance coverage dispute between Petitioner Arnold D. Berkeley ("Berkeley") and Respondent The Home Insurance Company ("Home"). Berkeley, an attorney, sued his former client, the Arizona Electric Power Cooperative, Inc. ("AEPCO"), for more than $67 million in legal fees. AEPCO filed a counterclaim against Berkeley alleging, *inter alia*, that Berkeley breached his fiduciary duty to AEPCO as a result, in part, of a conflict of interest arising out of his representation of another client who had taken positions, in litigation, adverse to AEPCO. (A. 3, 4).[1] Berkeley tendered the counterclaim defense to Home, but Home declined to defend Berkeley on the ground that the relief sought by AEPCO constituted the return of legal fees, which was excluded from coverage under the policy. Berkeley then arranged for the law firm of Steptoe and Johnson, the firm representing Berkeley in his fee claim against AEPCO, to represent him in connection with the counterclaim. (A. 4).

The fee dispute and counterclaim were tried before a panel of arbitrators, pursuant to an agreement between Berkeley and AEPCO. The arbitration panel awarded Berkeley $9.221 million of the legal fees he sought, but also ordered Berkeley to remit 15% of those fees to AEPCO in view of Berkeley's conduct, which the panel determined was "below the level of propriety expected of a member of the Bar." (A. 4, 5).

Following the arbitration panel's ruling, Berkeley again contacted Home and requested that Home indemnify him for the amount of his fee award he was required to remit to AEPCO as well as reimburse him for his attorney's fees and costs in defending against AEPCO's counterclaim. When Home denied

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1. "A." references are to the Appendix to the Petition for Writ of Certiorari.

coverage, Berkeley sued Home in the United States District Court for the District of Columbia. In count one of his complaint, Berkeley sought contract damages based on Home's refusal to provide a defense in connection with AEPCO's counterclaim. In count two of his complaint, Berkeley sought a declaratory judgment that Home must indemnify him in connection with AEPCO's counterclaim award. (A. 5).

Home filed a motion to dismiss Berkeley's Complaint on April 15, 1993. On May 18, 1993, Berkeley opposed Home's motion and filed his own motion seeking partial summary judgment as to Home's duty to defend and indemnify him under the policy. (A. 5). In support of its own motion to dismiss, and in opposition to Berkeley's motion for summary judgment, Home argued that Berkeley was not entitled to indemnification because the policy expressly excluded:

> any judgment or final adjudication based upon or arising out of any dishonest, deliberately fraudulent, criminal, maliciously or deliberately wrongful acts or omissions committed by the Insured.

(A. 11; D.E. 9, 10).[2]

Berkeley responded to Home's argument in his reply to Home's opposition to his motion for partial summary judgment. (D.E. 14). On October 5, 1993, the district court held a hearing on the two motions. At the hearing, Berkeley's counsel argued that it would be "totally inappropriate" to have a trial on the question of whether Berkeley's conduct came within the policy exclusion. (D.E. 22 at p. 32). The district court did not rule on the motions at the hearing, but rather directed the parties to file

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2. "D.E." references are to the Docket Entries in the district court.

supplemental pleadings. (A. 5, 6). Home, in its supplemental brief, again argued that if Berkeley "committed dishonest or deliberately wrongful acts," Home would not be obligated to indemnify Berkeley for any damages he was required to pay to AEPCO. (D.E. 27 at p. 37). Berkeley, in his reply to Home's supplemental brief, argued:

> this case boils down to whether the "improprieties" found by the Arbitrators were "dishonest" or "deliberately wrongful." As we demonstrated earlier, pp. 6-8, supra, this is a pure question of contract law: what are the meanings of those phrases in the policy and whether the "improprieties" found by the Arbitrators amount to either "dishonest" or "deliberately wrongful" acts. *Carey Canada, Inc. v. Columbia Cas. Co.*, 940 F.2d 1548, 1558-59 (D.C. Cir. 1991). [¶] Each of these are questions of law to be decided by this Court.

(D.E. 41 at p. 16).

On January 26, 1994, the district court entered its Order granting partial summary judgment in favor of Berkeley on Count I (the duty to defend) and dismissing Count II (the duty to indemnify). (A. 28). With respect to the duty to indemnify, the district court ruled that the exclusion was applicable because "[i]mpropriety of a lawyer is or should be recognized as 'dishonesty' within the meaning of the exclusion provision." (A. 27). On June 15, 1994, after extensive briefing by Berkeley and Home on the issue of Berkeley's damages under Count I (*see* D.E. 50, 52, 53, 56, 60, 63, 65), the district court issued its ruling on the amount of Berkeley's damages. (A. 32).

Berkeley's appeal challenged the district court's ruling that, as a matter of law, the policy exclusion relieved Home from indemnifying him, and also challenged the adequacy of the amount of damages the district court awarded him in connection with Home's refusal to defend him. On November 3, 1995, the court of appeals affirmed the dismissal of Berkeley's claim for indemnification based on the provision in the exclusion for "deliberately wrongful" conduct of the insured. The court of appeals also affirmed the district court's damage award, except to the extent that the district court denied any recovery for costs associated with AEPCO's appeals of the arbitration panel's award. (A. 3). Berkeley's petition for rehearing in the court of appeals was denied on December 21, 1995. (A. 22).

REASONS FOR DENYING THE WRIT

The writ should be denied because the petition fails to present an important question of federal law where the court of appeals' decision is in conflict with other circuits, nor does the petition demonstrate that the court of appeals' decision departed from the accepted and usual course of judicial proceedings.

I.

IT WAS ACCEPTABLE FOR THE COURT OF APPEALS TO AFFIRM THE DISTRICT COURT'S DISMISSAL OF BERKELEY'S INDEMNIFICATION CLAIM ON A DIFFERENT GROUND.

This Court has long recognized that "if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering v. Gowran,* 302 U.S. 238, 245 (1937). The rationale behind this rule was explained by the Court in *Securities and Exchange Comm'n v. Chenery Corp.,* 318 U.S. 80 (1943):

> The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate.

318 U.S. at 88.

In affirming the district court's order dismissing Berkeley's indemnification claim, the court of appeals stated:

> The district court concluded that "[i]mpropriety of a lawyer is or should be recognized as 'dishonesty' within the meaning of the exclusion provision." * * * We need not decide whether the "improprieties" noted by the arbitration panel and the conflict of interest found by D.C. Bar Counsel constituted "dishonest" conduct within the meaning of the exclusionary clause. There is some supporting authority applicable to a member of the District of Columbia Bar. [Citations omitted]. But, in any event, we do not think it can be seriously disputed that Berkeley's conduct falls within the policy exclusion for "deliberately wrongful" conduct.

(A. 11, 12).

The construction and effect of insurance contracts is a matter of law to be determined by the trial court. *See American Red Cross v. Travelers Indem. Co.*, 816 F. Supp. 755, 758 (D.D.C.

1993). The district court concluded, as a matter of law, "[i]mpropriety of a lawyer is or should be recognized as 'dishonesty' within the meaning of the exclusion provision." (A. 27). The court of appeals reviewed that question of law *de novo* (*see Herbert v. Nat'l Academy of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992)), and concluded that Berkeley's conflict of interest constituted "deliberately wrongful" conduct within the meaning of the policy exclusion. (A. 12-18). Contrary to Berkeley's assertion, the court of appeals' ruling did not require it to decide any questions of fact.[3]

Berkeley's reliance on this Court's decision in *Fountain v. Filson*, 336 U.S. 681 (1949) is misplaced. In that case, the plaintiffs alleged that the defendants' interest in certain realty located in New Jersey was subject to a resulting trust in favor of the plaintiffs in the amount of $6,000. The district court granted summary judgment in favor of the defendants on the basis that New Jersey law did not permit the imposition of a resulting trust under the circumstances alleged in the complaint. The court of appeals agreed that under New Jersey law no resulting trust could arise; however, based on its own review of the record, the court of appeals remanded the matter to the district court with instructions to enter judgment in favor of the plaintiffs for $6,000. 336 U.S. 681-682. This Court reversed the court of appeals' ruling because

> [t]here was no occasion in the trial court for [the defendant] to dispute the facts material to a claim that a personal obligation existed, since the only claim considered by that court on her motion for summary judgment was the claim that there was a resulting trust. When

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3. It should be noted Berkeley, himself, admits that "[t]he essential facts of this case are undisputed." Petition at 11.

> the Court of Appeals concluded that the trial court should have considered a claim for personal judgment it was error for it to deprive [the defendant] of an opportunity to dispute the facts material to that claim by ordering summary judgment against her.

336 U.S. at 683.

Fountain is inapposite for two reasons. First, the court of appeals in the case at issue *affirmed* the district court's ruling on a different ground; it did not, *sua sponte*, dismiss Berkeley's claim for indemnification. Second, there were no factual disputes to be decided with respect to whether Berkeley's conflict of interest constituted "deliberately wrongful" conduct within the context of the exclusionary provision. In fact, in the district court, Berkeley correctly acknowledged that this was purely a "question of contract law." (D.E. 41 at p. 16). Accordingly, the court of appeals did not depart from the accepted and usual course of judicial proceedings, nor did it misapply any rule of law, in affirming the district court's decision on a different ground.

II.

THE COURT OF APPEALS APPLIED THE APPROPRIATE STANDARD IN REVIEWING THE DISTRICT COURT'S AWARD OF DAMAGES

Berkeley asserts that the court of appeals was required to conduct a *de novo* review of the district court's award of damages. Berkeley is just plain wrong. To begin with, the district court did not determine the amount of Berkeley damages at the summary judgment stage of the proceedings. In fact, Berkeley chose to bifurcate the issues of liability and damages.

(*See* D.E. 14 at p. 3). Consequently, in its order granting Berkeley partial summary judgment as to Home's duty to defend, the district court established the following procedure for the "damage phase" of the case: Berkeley was to file and serve "an itemization of his costs of representation from the arbitration proceeding and the prejudgment interest on those costs" and Home could file a response to Berkeley's itemization. (A. 28, 29). After extensive briefing by both parties, the district court issued its June 15, 1994 Order, which awarded Berkeley $404,260.23, plus prejudgment interest. (A. 39).

In his appeal, Berkeley challenged the amount of district court's damage award on several grounds. The court of appeals applied the "clearly erroneous" standard in reviewing each of Berkeley's challenges to the district court's order and reversed the district court on only one aspect of the award. (A. 18-21).

In the District of Columbia Circuit, "a damage award is a finding of fact governed by Fed.R.Civ.P. 52(a), and is not to be disturbed unless it is determined to be 'clearly erroneous'." *Safer v. Perper,* 569 F.2d 87, 100 (D.C. Cir. 1977). The court of appeals' application of the "clearly erroneous" standard of review for damage awards is not in conflict with any of the other circuits on this issue. *See Four Corners Service Station, Inc. v. Mobil Oil Corp.,* 51 F.3d 306, 312 (1st Cir. 1995); *Sands v. Runyon,* 28 F.3d 1323, 1327 (2nd Cir. 1994); *Tyminski v. United States,* 481 F.2d 257, 271 (3rd Cir. 1973); *U.S. Fire Ins. Co. v. Allied Towing Corp.,* 966 F.2d 820, 825 (4th Cir. 1992); *Marine Trans. Line v. M/V Tako Invader,* 37 F.3d 1138, 1140 (5th Cir. 1994); *Adkins v. Asbestos Corp., Ltd.,* 18 F.3d 1349, 1351 (6th Cir. 1994); *Stanley Gudyka Sales v. Lacy Forest Products,* 915 F.2d 273, 277 (7th Cir. 1990); *Hall v. Gus Const. Co., Inc.,* 842 F.2d 1010, 1017 (8th Cir. 1988); *Sutton v. Earles,* 26 F.3d 903, 918 (9th Cir. 1994); *Hull by Hull v. United States,* 971 F.2d 1499, 1512 (10th Cir. 1992), *cert. denied,* 507 U.S. 1030 (1993);

Nakajima v. United States, 965 F.2d 987, 990 (11th Cir. 1992). Nor does Berkeley contend that the court of appeals misapplied the "clearly erroneous" standard in reviewing the district court's damage award. Accordingly, there is no basis for Berkeley's Petition.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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